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No. 07-1309

In The Supreme Court of the United States

EDMUND BOYLE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND MCKESSON CORPORATION AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether an association-in-fact "enterprise" under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, must possess an ascertainable structure rather than merely be capable of engaging in the alleged pattern of racketeering activity.

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND MCKESSON CORPORATION AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY[1]

The Chamber of Commerce of the United States of America and McKesson Corporation respectfully submit this brief as *amici curiae* in support of neither party.

INTERESTS OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

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[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

McKesson Corporation is the nation's leading healthcare and information technology company, and is the largest pharmaceutical distributor in North America. McKesson is responsible for the distribution of one-third of the medicines used in North America, and supplies more than 25,000 healthcare locations across the country, ranging from Wal-Mart to the Department of Veterans Affairs to community pharmacies. McKesson employs 30,000 people, and is among the Global Fortune 500.

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, serves an important purpose to deter and punish organized criminal conduct. RICO has been extended, however, beyond the scope of its statutory text in some circumstances and misused against businesses and other organizations because of the civil remedy provision which grants to plaintiffs treble damages and the recovery of attorneys' fees. In a number of cases, courts have unnecessarily expanded liability under RICO through an overbroad interpretation of what constitutes a RICO "enterprise." For example, under the rationale employed by the court below and a minority of other courts of appeals, the government and civil plaintiffs under 18 U.S.C. § 1962(c) can adequately establish a RICO association-in-fact "enterprise" by demonstrating nothing more than a group of individuals capable of accomplishing the alleged racketeering activity.

Such rulings override an important statutory check on the award of treble damages that Congress established in the more restricted definition it provided for "enterprise" in the statute. Those rulings threaten RICO litigation against every business collaboration in which legitimate businesses might engage, because they determine whether the enterprise requirement is met based on what the so-called "enterprise" does rather than what it is. Such collaborations among business entities and persons, ranging from a single contract to more elaborate alliances, are essential for many American businesses to compete effectively, expand into new markets, make costly investments, and engage in innovation. The unconstrained definition of enterprise adopted below allows plaintiffs to transform run-of-the-mill civil actions into RICO actions for treble damages against businesses who engage in lawful collaborations.

Amici have a strong interest in the Court correctly interpreting RICO and vacating the decision below so that the jury can be properly instructed as to RICO's enterprise requirement.

STATEMENT

1. Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. No. 91-452, tit. IX, 84 Stat. 941, in 1970 to combat the growing influence of organized crime over the national economy. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S.

479, 494-500 (1985); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 245 (1989).

In 18 U.S.C. § 1962, RICO establishes a series of prohibited activities. Relevant to the instant dispute, Section 1962(c) makes it "unlawful for any person employed by or associated with any enterprise" "to conduct or participate * * * in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). Based upon this plain language, the Court has held that a violation of Section 1962(c) requires proof of four independent elements—*viz.*, that a defendant (1) conduct the affairs of (2) an enterprise with which he is associated or employed (3) through a pattern (4) of racketeering activity. *Sedima*, 473 U.S. at 496. And Section 1962(d) also imposes liability on anyone who conspires to violate Section 1962(c).

Each of these elements of Section 1962(c) is defined by the statute or has been previously construed by this Court. (1) To "conduct" the affairs of an enterprise, the defendant must participate in the operation or management of the enterprise. *Reves v. Ernst & Young*, 507 U.S. 170 (1993). (2) RICO defines "enterprise" to "include[ ] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). (3) A "pattern" of racketeering activity requires at least two racketeering acts within 10 years, *id.* § 1961(5), and (4) "racketeering activity" is defined to include any one of a host of enumerated

acts, including acts that are indictable under federal criminal statutes (such as mail and wire fraud) as well as numerous types of conduct that are chargeable under state law, *id*. § 1961(1).

Criminal violations of Section 1962 are punishable by up to 20 years' imprisonment (or life, in some circumstances), a fine, and criminal forfeiture. *Id*. § 1963.

A plaintiff in a civil action may recover damages if that person was "injured in his business or property by reason of a violation of [S]ection 1962" and Section 1964 specifies that the person "shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." *Id*. § 1964(c). Section 1964(a) and (b) also imposes significant civil penalties for violations of RICO.[2]

2. Petitioner was convicted of racketeering in violation of 18 U.S.C. § 1962(c) and conspiracy to commit racketeering in violation of 18 U.S.C. § 1962(d), as well as other crimes related to a string

[2] With regard to civil RICO actions, the government can seek only civil penalties and injunctive relief under Section 1964(a) and (b). The government is not authorized to bring treble damages actions under 18 U.S.C. § 1964(c), *see United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 21-27 (2d Cir. 1989) (holding that the United States is not a "person" who can sue under Section 1964(c)). Also the causation requirement imposed by Section 1964(c) that the person be injured in his "business or property by reason of a violation of section 1962" does not apply in criminal cases.

of bank robberies that petitioner and other members of his crew committed in at least five States between 1991 and 1999.[3]

In the jury instructions, the district court explained that "an enterprise need not be a formal business entity such as a corporation, but may be merely an informal association of individuals. * * * Common sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure." JA 111a-112a.

The district court emphasized that the jury "may find an enterprise where an association of individuals, without structural hierarchy, forms solely for the purpose of carrying out a pattern of racketeering acts." JA 112a. And the court stated that "it is not necessary that the enterprise have any particular or formal structure, but it must have sufficient organization that its members functioned and operated in a coordinated manner in order to carry out the alleged common purpose or purposes of the enterprise." *Ibid.* The instructions were given over petitioner's objection.

3. The court of appeals affirmed petitioner's conviction but vacated his sentence. Pet. App. 4a.

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[3] Petitioner was also convicted of conspiracy to commit bank burglary, in violation of 18 U.S.C. § 371; and eight counts of bank burglary or attempted bank burglary, in violation of 18 U.S.C. § 2113(a).

Petitioner argued to the court of appeals that the district court's instructions were erroneous because they failed to require the government to establish that the alleged enterprise had "an ascertainable structure distinct from that inherent in the alleged pattern of racketeering." Boyle C.A. Br. 20 (internal quotation marks and citation omitted).

The court of appeals rejected the argument, among others, as "without merit." Pet. App. 3a. The well-settled precedent in the Second Circuit holds that the "enterprise" element of RICO must be given "broad scope," *United States v. Mazzei*, 700 F.2d 85 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983), and, consistent with the district court's instruction to the jury in this case, the Second Circuit has "upheld application of RICO to situations where the enterprise was, in effect, no more than the sum of the predicate racketeering acts," *United States v. Bagaric*, 706 F.2d 42, 55 (2d Cir. 1983) (citing *Mazzei*, 700 F.2d at 88-89), *abrogated on other grounds by*, *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994).

SUMMARY OF ARGUMENT

A. The Racketeer Influenced and Corrupt Organizations Act (RICO) imposes criminal liability and authorizes a civil treble damages award against a person who is employed by or associated with an "enterprise" and who conducts the affairs of that "enterprise" through a pattern of racketeering, 18

U.S.C. § 1962(c), or conspires to do the same, *id*. § 1962(d). RICO defines "enterprise" for this purpose as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id*. § 1961(4). This case presents the question whether the government, or a plaintiff in a civil suit, must establish that an association-in-fact enterprise possesses an ascertainable structure or whether it is sufficient for the government or the plaintiff to prove that the "union or group of individuals" allegedly associated in fact was capable of conducting the pattern of racketeering activity alleged.

The court below mistakenly defines a RICO enterprise to require nothing "more than the sum of the predicate racketeering acts." *United States v. Bagaric*, 706 F.2d 42, 55 (2d Cir. 1983), *abrogated on other grounds by*, *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994). The court reasons that an ascertainable structure need not be established because "it is logical to characterize any associative group in terms of what it *does*, rather than by any abstract analysis of its structure." *Id*. at 56 (emphasis in original).

That interpretation of what constitutes a RICO enterprise is wrong on two grounds. First, it ignores the plain language of 18 U.S.C. § 1961(4) that expressly defines an "enterprise" by what it is, rather than what it does. And, second, the refusal to require that there be some ascertainable structure before a

group of individuals engaged in racketeering can be deemed a RICO enterprise eviscerates any distinction between the separate "enterprise" and "pattern of racketeering" elements of a RICO Section 1962(c) offense.

B. The existence of a RICO enterprise is the critical factor that distinguishes a RICO violation from that of an ordinary conspiracy. Congress enacted RICO to attack the infiltration into legitimate organizations by organized crime and racketeering and to eradicate racketeering activity conducted by organized crime. Requiring that an ascertainable structure exist is consistent with these goals because, by their very nature, organizations such as the mafia and drug cartels must operate through such a structure in order to be able to function effectively and to evade law enforcement and it is that particular criminal success that Congress targeted as more dangerous to society and deserving of harsher criminal and civil penalties.

The application by other Circuits of an interpretation that requires an ascertainable structure to satisfy the RICO enterprise requirement demonstrates that such an interpretation does not preclude successful prosecutions under RICO. Courts of appeals applying the ascertainable structure requirement have repeatedly and routinely upheld convictions, notwithstanding arguments challenging the evidentiary findings on the existence of an ascertainable structure. Indeed, we do not take a position on whether application of this more stringent

standard under Sections 1961(4) and 1962(c) would exonerate petitioner because there may be sufficient evidence of an enterprise under the ascertainable structure standard, but we demonstrate that the jury instruction given at his trial was contrary to the enterprise requirement of RICO.

C. Adoption by this Court of the Second Circuit's overbroad definition of the RICO enterprise requirement under Section 1961(4) and 1962(c) would have particularly grave consequences for this Nation's businesses.

There can be no dispute that not every conspiracy constitutes an "enterprise" for RICO purposes. If it were otherwise and a simple group of individuals without any ascertainable structure satisfied the RICO enterprise requirement, every conspiracy to commit fraud would constitute a RICO enterprise and every fraud that requires more than one person to commit would constitute a RICO violation. Such a transformation of simple conspiracies and business torts into racketeering activity subject to treble damages would impose significant civil RICO liability costs because allegations of wrongdoing involving common, legitimate business arrangements, would now be made in the form of RICO allegations with the threat of treble damages.

D. If this Court nonetheless concludes that an association-in-fact enterprise requires no ascertainable structure, the Court's holding should be

limited to a "union or group of *individuals*"—*i.e.*, human beings—not corporations or other non-individual legal entities. Had Congress intended "individual" to include a "corporation" it would not have included both terms in the definition for enterprise in Section 1961(4).

ARGUMENT

THE PLAIN LANGUAGE OF SECTIONS 1961(4) AND 1962(C) REQUIRE THE GOVERNMENT OR A CIVIL RICO PLAINTIFF TO PLEAD AND PROVE THAT A RICO ASSOCIATION-IN-FACT ENTERPRISE HAS AN ASCERTAINABLE STRUCTURE AND NOT JUST ESTABLISH THAT A GROUP OF INDIVIDUALS IS CAPABLE OF CONDUCTING THE ALLEGED PATTERN OF RACKETEERING ACTIVITY

The plain language of Section 1962(c) imposes liability on a defendant in a RICO action only if the defendant (1) conducts the affairs (2) of an enterprise with which the defendant is associated or employed (3) through a pattern of (4) racketeering activity. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). At issue in the instant case is what the government, or a plaintiff in a civil case, must plead and prove to satisfy the RICO "enterprise" element. The court below has long permitted the RICO enterprise requirement to be satisfied so long as there is proof of a "pattern of racketeering activity." But that construction of the RICO statute erroneously merges two distinct elements of Section 1962(c) and two separate definitions under Section 1961.

A. The Rulings Of The Court Below And Of A Few Other Circuits Erroneously Conflate The Separate Statutory Requirements Of A RICO "Enterprise" And A "Pattern Of Racketeering Activity"

1. The court below and a minority of federal courts of appeals to have considered the issue are wrong that the RICO requirement of an association-in-fact enterprise can be satisfied by any group of two or more individuals who are capable of performing the racketeering activity through which the defendant is alleged to have conducted the enterprise's affairs. According to the Second Circuit, a RICO association-in-fact "enterprise" need not be any "more than the sum of the predicate racketeering acts" because "it is logical to characterize any associative group in terms of what it *does*, rather than by any abstract analysis of its structure." *United States v. Bagaric*, 706 F.2d 42, 55-56 (2d Cir. 1983) (emphasis in original), *abrogated on other grounds by*, *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994).

That rationale ignores the statutory text of RICO which must be the starting place for construing the statute. *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993). The plain language of the definition of "enterprise" in Section 1961(4) and of the prohibited activity in Section 1962(c) unquestionably requires more than proof of a pattern of racketeering activity to satisfy the RICO enterprise requirement and to

impose RICO criminal and treble civil damages liability under Section 1962(c).

a. The rationale of the Second Circuit is contrary to RICO's explicit statutory definition of "enterprise" in Section 1961(4). For RICO purposes, an "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Nothing in this text defines an enterprise by the "terms of what it does." Rather, the text of Section 1961(4) defines an enterprise by what it is. Indeed, Section 1961(4) divides the term "enterprise" into two distinct categories that focus only on the structure and composition of the organization. In the first category, the enterprises are legal entities. The second category covers enterprises that are not legal entities but that are composed of unions or groups of individuals associated in fact.

Based on this text, this Court has held that "[e]ach category [of an enterprise] describes a separate type of enterprise to be covered by the statute—those that are recognized as legal entities and those that are not. The latter is not a more general description of the former." *United States v. Turkette*, 452 U.S. 576, 582 (1981). Had Congress intended *any* group of individuals to satisfy the enterprise requirement based solely upon what that group does, as the court below suggests, it would not have been necessary for Congress to create the two distinct categories of legal entities and not legal

entities. Congress instead would have defined "enterprise" to mean any group or organization. *United States v. Santos*, 128 S. Ct. 2020, 2029 n.6 (2008) ("We do not normally interpret a text in a manner that makes one of its provisions superfluous.").

The statutory structure of the Section 1961(4) definition also demonstrates that an association-in-fact enterprise requires proof of an ascertainable structure. This Court has repeatedly recognized that "a word is known by the company it keeps." *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). Statutory terms capable of many meanings must be interpreted by reference to their relationship with other associated words and phrases. *Ibid.* General terms such as "union" and "group" must be "construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001)).

An overbroad interpretation of "any union or group of individuals associated in fact" as used in Section 1961(4) would violate this tenet, because it ignores the inherent structure that exists in the entities to which Congress intended to refer as association-in-fact enterprises. The presence of specific enumerated legal entities in the first category of the statutory definition of enterprise "indicates that the statute covers only" unions or groups in the

second category of enterprise that have a "*similar*" sort of structure to the legal entities in the first category, "rather than *every*" union or group of more than one individual. *Begay v. United States*, 128 S. Ct. 1581, 1585 (2008) (emphases in original).[4]

b. The longstanding interpretation of RICO's enterprise requirement by the court of appeals below ignores the manner in which the term "enterprise" is used in Section 1962 which makes unlawful under RICO certain "prohibited activities."

Liability under Section 1962(c) is predicated upon proof of four distinct elements: a defendant's (1) conduct or participation in the affairs (2) of an enterprise with which the defendant is associated or employed (3) through a pattern of (4) racketeering activity. This Court has held that Section 1962(c) requires the government, or a private plaintiff in a

[4] To the extent the government relies on the fact that Section 1961(4) uses the term "*any* union or group," this Court should find the Court's construction of Section 1961 in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), instructive. In *H.J.*, this Court explained that the Section 1961 definition of "pattern of racketeering" "does not so much define a pattern of racketeering activity as state a minimum necessary condition for the existence of such a pattern." *Id.* at 237. Although some definitions in Section 1961 specify what a particular term "means," the "enterprise" definition begins with the phrase "enterprise *includes*," and sets forth the minimum conditions required, but not necessarily sufficient, to meet that definition.

civil case, to "allege each of these elements to state a claim." *Sedima*, 473 U.S. at 496.

The "enterprise" and "pattern of racketeering activity" requirements are distinct elements. *Turkette*, 452 U.S. at 583. "The enterprise is an *entity*, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct" and "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Ibid*. (emphasis added). By contrast, "[t]he pattern of racketeering activity is * * * a series of criminal acts defined by statute" which are proven "by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise." *Ibid*.

An examination of Section 1962(c) as a whole demonstrates that the distinct enterprise requirement must not be guided by what it accomplishes but by its form as an ascertainable entity. *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). It is the pattern of racketeering requirement, not the enterprise requirement, which focuses on the alleged unlawful conduct.

To define an association-in-fact enterprise based upon "what it *does*, rather than by * * * its structure,"

Bagaric, 706 F.2d at 56 (emphasis in original), ignores the statutory structure set forth in *Turkette* that an enterprise is an "*entity*" with an ongoing organization functioning as a continuing unit. The absence of any requirement of an ascertainable structure for a RICO enterprise would eviscerate any distinction between the "enterprise" and "pattern of racketeering" elements of RICO under Section 1962(c). *Cf. Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001) ("We do not quarrel with the basic principle that to establish liability under § 1962(c) one must allege and prove two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is simply not the same 'person' referred to by a different name."). And if the enterprise requirement were satisfied merely by allegations of a defendant or defendants engaging in a pattern of racketeering activity, then the enterprise requirement would be superfluous to the statutory scheme, contrary to the ordinary assumption that Congress intended statutory terms to have meaning. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

It is of no moment that this Court has noted that "the proof used to establish these separate elements may in particular cases coalesce." *Turkette*, 452 U.S. at 583. Certain highly complex patterns of racketeering activity prosecuted under RICO, *see, e.g., United States v. Bledsoe*, 674 F.2d 647, 652-654 (8th Cir.) (detailing racketeering activities based on extensive fraudulent interstate sales of securities), *cert. denied*, 459 U.S. 1040 (1982), might necessarily

require an association-in-fact enterprise to possess a significant ascertainable organizational structure in order to accomplish the enterprise's unlawful goals. In those limited circumstances, it may be that an enterprise's ascertainable structure is demonstrated by the proof of the complex pattern of racketeering activity charged in the indictment or alleged in the civil complaint. But in the ordinary case, proof of two or more acts of racketeering—such as two or three acts of federal wire fraud—do not in and of themselves demonstrate that the alleged "group of individuals" formed a RICO enterprise. *Whelan v. Winchester Prod. Co.*, 319 F.3d 229, 230 (5th Cir. 2003) (explaining that mailing a few false production reports for one's company is not enough in and of itself to constitute a RICO enterprise between individuals). Indeed, the Court has made clear that "proof of one [RICO element] does not necessarily establish the other." *Turkette*, 452 U.S. at 583.

2. The oft-mischaracterized language from *Turkette*, that "[t]here is no restriction upon the associations embraced by" Section 1961(4), *id*. at 580, does not mean that any group of two or more individuals automatically satisfies the enterprise requirement. *See United States v. Perholtz*, 842 F.2d 343, 353 (D.C. Cir.) (quoting *Turkette*, 452 U.S. at 580), *cert. denied*, 488 U.S. 821 (1988); *United States v. Blinder*, 10 F.3d 1468, 1473 (9th Cir. 1993). That language refers to the fact that there is no limitation on the *types* of associations—*i.e.*, legitimate or illegitimate—that satisfy RICO's requirements.

Turkette, 452 U.S. at 580-581. It does not say that any group of individuals, merely because it can accomplish some racketeering activity, automatically constitutes a RICO enterprise.

Likewise, the fact that RICO contains an "express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes,'" *Sedima*, 473 U.S. at 498 (quoting RICO, § 904(a), 84 Stat. at 947), does not support the ruling below. Because the statutory text plainly requires that the "enterprise" definition set forth in Section 1961(4) and "enterprise" element set forth in Section 1962(c) be satisfied by more than proof of a "pattern of racketeering," the "liberal construction clause" of RICO does not inform this Court's interpretation of the statute in this case. That clause is intended only "to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute," and "it is not an invitation to apply RICO to new purposes that Congress never intended." *Reves*, 507 U.S. at 183; *cf. Norfolk Southern Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007) (noting that a statute's prior liberal construction and "remedial purpose cannot compensate for the lack of a statutory basis").

3. There is no doubt that the jury in this case was improperly instructed on the RICO enterprise requirement.

The district court explained to the jury that "[c]ommon sense suggests that the existence of an association-in-fact is oftentimes more readily proven

by what it does, rather than by abstract analysis of its structure." JA 111a-112a. And the court emphasized that any group formed solely to carry out the charged racketeering activity is sufficient to prove a RICO enterprise. JA 112a ("[Y]ou may find an enterprise where an association of individuals, with structural hierarchy, forms solely for the purpose of carrying out a pattern of racketeering acts."). Although the district court's instruction requires some "organization," the court eviscerated that requirement by stating that the group need only have "sufficient organization that its members functioned and operated in a coordinated manner in order to carry out the alleged common purpose or purposes of the enterprise." JA 112a-113a.

In short, the district court instructed the jury that the group of individuals need only be capable of accomplishing the alleged pattern of racketeering activity to be deemed a RICO enterprise satisfying an element of the Section 1962(c) offense. The district court's instruction thus contradicts the plain language of Sections 1961(4) and 1962(c), and conflates the separate enterprise and pattern of racketeering requirements. *Turkette*, 452 U.S. at 583 ("The existence of an enterprise at all times remains a separate element which must be proved by the Government.").

Under the district court's jury instruction (which is based on the Second Circuit's standard charge, *see* JA 106a), once a pattern of racketeering activity is established, then so too is the enterprise that was

necessary to accomplish that racketeering activity. That is, the government's proof that petitioner had committed racketeering activity *necessarily* demonstrated, in and of itself, that his group had the sufficient "organization" to carry out that racketeering activity and thus constituted a RICO enterprise. As discussed above, the RICO enterprise element cannot be so easily satisfied.

B. Requiring An Ascertainable Structure For A RICO Association-In-Fact Enterprise Is Consistent With The Statute's Purpose

1. In enacting RICO, a chief concern of Congress was the ability of organized crime to infiltrate legitimate business, *see Turkette*, 452 U.S. at 590; *Reves*, 507 U.S. at 185, but Congress also set its sights on sophisticated criminal operations such as "syndicated gambling, loan sharking, * * * [and] the importation and distribution of narcotics and other dangerous drugs." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922-923; *see also Russello v. United States*, 464 U.S. 16, 26 (1983). By its very nature, a sophisticated criminal operation such as the mafia, a gang, or a drug cartel cannot function effectively and evade law enforcement without an ascertainable structure through which it subversively operates. Indeed, maintaining a structure through which it can conduct illegitimate activities assists a crime syndicate to bolster its economic resources and thus position itself to "springboard into the sphere of legitimate enterprise."

Turkette, 452 U.S. at 591. In either case—whether operating a legal or nonlegal entity—the ascertainable structure requirement comports with Congress's desire that RICO target criminal activity that is sophisticated enough to infiltrate legitimate businesses.

While unnecessary to resolve the instant case, the legislative history is replete with references to the highly structured nature of organized crime that Congress sought to combat. The Senate Report's "Statement In Justification," for example, explicitly noticed the "hierarchical structure" of organized crime syndicates, with "[e]ach family * * * headed by a 'boss,' whose primary functions are the maintenance of order and the maximization of profit." S. Rep. No. 91-617, at 36 (1969). Such organizations contain an "underboss" and a "consigliere" and below them are the "capodecina." *Ibid.* Further "[b]elow the 'capodecina' are the 'soldati' or the 'button' men" who "actually operate the particular illicit enterprise." *Id.* at 40. This sort of rank and hierarchy are plainly indicative of the type of association-in-fact enterprises that RICO sought to punish and deter.

The "enterprise" requirement is the critical factor that makes a RICO offense different from a common conspiracy. It would make no sense for RICO to be transformed into a common conspiracy because RICO independently makes it unlawful for any person to conspire to violate any provision of Section 1962. 18 U.S.C. § 1962(d).

2. Government prosecutions under RICO will not be hindered by an ascertainable structure requirement.

In the Third, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits, which already require proof of an ascertainable structure, the enterprise requirement has not adversely affected criminal RICO prosecutions. Association-in-fact enterprises are readily proven because they often are organized criminal associations that possess significant structure (including, for example, significant hierarchy and even organizational names). The prototypical "organized crime," such as the mafia and drug gangs, that RICO has traditionally aimed at punishing and deterring easily satisfies the RICO ascertainable structure enterprise requirement and thus can be successfully prosecuted. *See United States v. Chance*, 306 F.3d 356, 365-367, 371-373 (6th Cir. 2002) (criminal activities of the Mafia, "La Cosa Nostra"); *United States v. Smith*, 413 F.3d 1253, 1263-1264, 1266-1268 (10th Cir. 2005) (criminal activities of street gang, the "King Mafia Disciples"), *cert. denied*, 546 U.S. 1120 (2006). In *United States v. Kehoe*, 310 F.3d 579, 587 (8th Cir. 2002), *cert. denied*, 538 U.S. 1048 (2003), for example, the Eighth Circuit concluded that a white supremacist organization named the Aryan Peoples' Republic and the Aryan Peoples' Resistance demonstrated a significant ascertainable structure where the evidence showed that (i) there was a hierarchy in the group; (ii) one person founded and led the group; and (iii) the leader

possessed and controlled the majority of the proceeds from the illegal activities and distributed the remainder to his cohorts. These Circuits have repeatedly and routinely upheld convictions, notwithstanding arguments challenging the evidentiary findings on the existence of an ascertainable structure. *See*, *e.g.*, *Bledsoe*, 674 F.2d at 665.

The mafia, drug organizations, and other illegal entities possess an ascertainable structure due to their "function of overseeing and coordinating the commission of several different predicate offenses and other activities on an ongoing basis." *United States v. Kragness*, 830 F.2d 842, 857 (8th Cir. 1987) (quoting *United States v. Riccobene*, 709 F.2d 214, 224 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983)). The oversight and coordination activities, and sharing information to avoid apprehension or to protect the unlawful activities or to defeat rivals, all demonstrate that an ascertainable structure exists, and is almost certainly present in the criminal organizations that RICO was designed to combat. *See, e.g.*, *United States v. Darden*, 70 F.3d 1507, 1520-1521 (8th Cir. 1995) (affirming RICO conviction; finding proof of a distinct, ascertainable structure to be "overwhelming" for a highly sophisticated drug organization), *cert. denied*, 517 U.S. 1149 (1996); *United States v. Keltner*, 147 F.3d 662, 668-669 (8th Cir. 1998) (affirming RICO conviction; finding a "distinct structure" where evidence showed that (i) one individual was "clearly in charge" and directed others' activities; (ii) items

stolen in earlier robberies were used in subsequent robberies; and (iii) alleged members of the enterprise engaged in intimidation and solicitation of perjury to protect their identity); *Smith*, 413 F.3d at 1267-1268 (affirming RICO conviction; finding sufficient evidence that the associated-in-fact enterprise existed apart from the pattern of racketeering activity); *Chance*, 306 F.3d at 372-373 (affirming conviction; finding that the evidence showed "a very clearly defined structure which was separate from the pattern of racketeering activity"); *United States v. Gray*, 137 F.3d 765, 772 (4th Cir.) (affirming conviction; finding substantial evidence of an identifiable structure based on the existence of a leader, an assistant, drug stash house workers, and a system of stash houses), *cert. denied*, 525 U.S. 866 (1998); *United States v. Sanders*, 928 F.2d 940, 943-944 (10th Cir.) (affirming conviction; finding evidence sufficient to establish the existence of an enterprise separate and apart from the racketeering acts), *cert. denied*, 502 U.S. 845 (1991).

3. *Amici* do not take a position on whether petitioner's crew possessed an ascertainable structure that would constitute a RICO enterprise and support the imposition of RICO liability. Evidence introduced at petitioner's trial showed that members of petitioner's crew had particular roles, protected their identities by using false names, engaged in advance surveillance and planning (including gathering the necessary tools), and divided the robbery proceeds in a systematic fashion in which members engaging in

higher risk roles were compensated with greater shares. Br. in Opp. at 6-12. These facts evince oversight and coordination activities, including coordination among members to avoid apprehension. Therefore, the government's proof at trial might have been sufficient to show the existence of an association-in-fact enterprise in circuits that already require proof of an ascertainable structure of an enterprise for RICO liability, *e.g.*, *Kehoe*, 310 F.3d at 587.

C. Legitimate Businesses Throughout The Nation Are Subject To Frivolous Civil RICO Actions That Would Require Them To Engage In Costly Trials Or Settlements Without Application Of The "Enterprise" Requirement That Congress Enacted

1. Adoption by this Court of the overbroad interpretation of the enterprise requirement in Sections 1961(4) and 1962(c) by the court of appeals below would have particularly grave consequences to this Nation's businesses because plaintiffs—enticed by RICO's treble damages and attorneys' fees—have brought an untold number of suits against legitimate businesses that attempt to evade the "essential [enterprise] element of the RICO offense" by creating "nebulous, open-ended description[s]" of the alleged RICO enterprise. *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 645 (7th Cir. 1995).

Where courts have not required proof of an ascertainable structure, simple business torts and

alleged conspiracies have been transformed into racketeering activity subject to treble damages for run-of-the-mill business arrangements. In *Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir.), *cert. denied*, 128 S. Ct. 464 (2007), for example, the plaintiff alleged that the RICO "enterprise" consisted of nothing more than a contractual relationship between Microsoft and Best Buy under which Best Buy would advertise and promote Microsoft's MSN Internet access service in its stores and Microsoft would advertise and promote Best Buy on its MSN Internet access service and Microsoft websites. *Id*. at 555. As the concurring opinion correctly observed, the plaintiffs' complaint in *Odom* "merely states that the existence of a marketing contract and the performance of that contract constitute an enterprise," and concluded that more should be required for a RICO claim because "RICO targets a more sophisticated crowd: those persons or entities associated in fact with 'ongoing organization.'" *Id.* at 555 (Silverman, J., concurring).

The Seventh Circuit aptly explained in *Bachman v. Bear Stearns & Co.,* 178 F.3d 930 (7th Cir. 1999) (Posner, C.J.), that not every conspiracy is an "enterprise" for RICO purposes. "If [the members of the alleged associated-in-fact enterprise, a disparate group of people and entities in the particular case before the court] are a RICO organization, then every conspiracy to commit fraud is a RICO organization and consequently every fraud that requires more than one person to commit is a RICO violation. That

is not the law." *Id.* at 932. The Seventh Circuit recently reaffirmed the concept that "a conspiracy is not a RICO enterprise unless it has some enterprise-like structure," *Limestone Dev. Corp. v. Village of Lemont, Ill.*, 520 F.3d 797, 804 (7th Cir. 2008) (Posner, J.), and that "enterprise" requires proof of "an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making." *Id*. at 805 (quoting *Richmond v. Nationwide Cassel*, 52 F.3d at 644); *see also McDonough v. National Home Ins. Co.*, 108 F.3d 174, 177 (8th Cir. 1997) (rejecting "conclusory allegation[s] * * * that the alleged enterprise consist[s] of more than what [is] necessary" to commit the predicate acts); *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 427 (5th Cir. 1987) (same).

2. The mistake made by the Ninth Circuit in *Odom* (and by the court below) is especially harmful given the crucial role that legitimate collaborative efforts between businesses have in our Nation's economy. Collaboration among businesses, which often consists of no more than a contract between two corporations, can create efficiencies, allow for penetration into new markets, and facilitate the sharing of complementary expertise or necessary market information. Entire sectors of the Nation's service economy, such as law and accounting firms, investment banks, and computer consultants, rely on such arrangements. As this Court has recognized, corporate collaborations "hold the promise of

increasing a firm's efficiency and enabling it to compete more effectively." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

But attaching the possibility of RICO liability to such collaborations—without requiring more—risks significant deterrence of such beneficial agreements, particularly given that RICO provides for treble damages and attorneys' fees, and in light of the attendant stigma of even an alleged violation. Those beneficial business arrangements would otherwise increase efficiencies and help maintain business competitiveness, which is particularly important in a time of economic uncertainty. Indeed, interpreted in this erroneous manner, RICO encourages consolidation rather than collaboration, because there is less liability for keeping certain functions in-house rather than entering into what might otherwise be a beneficial relationship.

Such economic consequences have no relationship to the abuse that RICO seeks to prevent (or the statute's text), and has been resoundingly criticized by a number of courts. As Judge Posner noted, "[w]e have never heard it suggested that RICO was intended to encourage vertical integration, yet that is the only effect that we can imagine flowing from" a rule that permits RICO claims against a corporation just because it "does business through agents" rather than by itself. *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 227 (7th Cir. 1997).

3. A decision by this Court that affirms the ruling below will lead to the further proliferation of RICO lawsuits against legitimate businesses. Civil RICO has become one of the most frequent and damaging devices used against businesses. Since 2001, a staggering 5,259 civil RICO cases have been filed, only 37 of which were brought by the government. *See Federal Judicial Caseload Statistics*, 2001-2007, Tables C-2 (U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit), at line "RICO," *available at* http://www.uscourts.gov/caseloadstatistics.html (last visited Nov. 25, 2008). These numbers plainly demonstrate what is already obvious: RICO has strayed well beyond its original intent of fighting organized crime. And now this Court is being asked to expand it further beyond its statutory text.

When the association-in-fact enterprise requirement is correctly applied, frivolous RICO actions against legitimate businesses are frequently disposed of due to the plaintiffs' failure to plead adequately or prove an association-in-fact enterprise under the ascertainable structure standard. *See Asa-Brandt, Inc. v. ADM Investor Servs., Inc.*, 344 F.3d 738, 752-753 (8th Cir. 2003) (affirming grant of summary judgment for defendants; holding that plaintiffs failed to prove an enterprise with a distinct ascertainable structure for purposes of their RICO claim); *Whelan*, 319 F.3d at 229-230 (affirming dismissal of plaintiffs' RICO claim; finding that plaintiffs failed to demonstrate a RICO enterprise

separate from the alleged predicate acts); *Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 676 (7th Cir. 2000) (affirming dismissal of plaintiffs' RICO claim; finding plaintiffs' "vague allegations of a RICO enterprise made up of a string of participants, known and unknown, lacking any distinct existence and structure," to be insufficient to state a RICO claim); *Begala v. PNC Bank*, 214 F.3d 776, 781-782 (6th Cir. 2000) (affirming dismissal of plaintiffs' RICO claim; finding that plaintiffs' complaint "essentially lists a string of entities allegedly comprising the enterprise, and then lists a string of supposed racketeering activities in which the enterprise purportedly engages," and holding that the plaintiffs failed to show that the alleged members of the associated-in-fact enterprise engaged in coordinated behavior sufficient to show that they functioned as a continuing unit), *cert. denied*, 531 U.S. 1145 (2001).

Without the "enterprise" standard that Congress required, these types of suits will be forced to go to costly trial, or will settle due to the mere threat of treble damages liability. Indeed, under the erroneous standard articulated by the court of appeals below, a case like *Reves v. Ernst & Young*, 507 U.S. 170 (1993), could yield a different result. There the plaintiffs sought to impose RICO liability on an arrangement between an accounting firm and a farmer's cooperative business. They alleged that the business was the enterprise and the accounting firm was liable under RICO as having "conducted or participated in the conduct of the 'enterprise's affairs,'" *Reves*, 507

U.S. at 185 (emphasis omitted), a burden they could not meet. Under the RICO enterprise standard in the Second Circuit, however, plaintiffs would need to allege only that the accounting firm and the farmer's cooperative, by nature of their contractual relationship, formed an enterprise together and then it could have sued both of them as participants in that enterprise allegedly conducting the affairs of the enterprise through racketeering.

D. If This Court Rejects The Ascertainable Structure Interpretation Of "Enterprise," The Court Should Make Clear That An Association-In-Fact Enterprise Must Be Comprised Of *Individuals*, Not Corporations Or Other Organizations

If this Court concludes that an association-in-fact enterprise requires no ascertainable structure and that the enterprise requirement is satisfied so long as the alleged pattern of racketeering is established, the Court should make clear that its holding applies only to a union or group of individuals—*i.e.*, persons—that form a nonlegal entity. Such a holding is required by the statutory text of Section 1961(4) because that statutory language explicitly states that an association-in-fact enterprise applies only to "any union or group of *individuals*," 18 U.S.C. § 1961(4) (emphasis added), not a corporation or other organization.

As discussed above (*see* Part A *supra*), the first category of the enterprise definition describes legal

entity enterprises and lists separately any "individual" and any "corporation." *Id*. § 1961(4). Had Congress intended "individual" to include a "corporation" it would not have included both terms in the definition. *TRW,* 34 U.S. at 31. It follows that when Congress used only "individual" and not "corporation" in the second prong of the enterprise definition (the association-in-fact prong), it did not include corporations within its meaning. *Reves*, 507 U.S. at 177-178 (explaining that Congress does not ordinarily give the identical term two different meanings in the same statute).[5]

Moreover, the context and structure of the RICO statute confirm that Congress intended the term "individual" not to include corporations for purposes of RICO. Congress defined "person" to include "any individual *or entity* capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (emphasis added). Congress thus used "individual" in the ordinary sense of the word to mean "an individual human being" and not a corporation or other organization. *Clinton v. New York*, 524 U.S. 417, 428

[5] Some lower courts have cited Congress's use of the term "includes" at the beginning of the "enterprise" definition and held that the list of entities that follows is not meant to be exhaustive. *See*, *e.g.*, *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980). This interpretation, however, overlooks the fact that "include" is usually used to "specify particularly" those items that fall within a classification. *Montello Salt Co. v. Utah*, 221 U.S. 452, 466 (1911).

n.13 (1998) (citing Webster's Third New International Dictionary 1152 (1986)). If Congress intended for the definition of an "individual" to include a corporation or other organization then the term "or entity" would be surplusage in this statutory definition set forth in Section 1961(3). *TRW*, 534 U.S. at 31.

Finally, the definitional provisions of Title 18 of the United States Code, where RICO is codified, explicitly use the term "individual" to exclude organizations. Congress explained that the term "organization" was "a person other than individual." 18 U.S.C. § 18. By providing such a definition, Congress made clear that an "organization" does not mean "individual"; the terms are mutually exclusive. As such, a corporation is a "person" under Title 18 since it is an organization, but it is not an "individual."

In sum, Congress defined the term "enterprise" in RICO to mean (1) a legal entity (including an individual *or* corporation) standing alone and (2) a less formal association in fact that does not constitute a legal entity, but only if such an association is a union or group of "individuals." It would be incongruous to permit an association-in-fact enterprise to be comprised of anything other than individual human beings because a corporation is not an individual under RICO.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated and remanded for a new trial.

Respectfully submitted,

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